Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1993

GARY K. BEHRENS,

*Petitioner,*

v.

KATHY SHARP, INDIVIDUALLY, and as an EMPLOYEE/OFFICER of PATRICK J. CANULETTE, SHERIFF, ST. TAMMANY PARISH, LOUISIANA; and PATRICK J. CANULETTE, SHERIFF, ST. TAMMANY PARISH, LOUISIANA,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. The District Court held the arrest warrants to be invalid, a holding assumed by the Court of Appeals to be correct. The District Court found that Detective Sharp did not execute the arrest warrants, a holding apparently assumed by the Court of Appeals to be correct. No evidence was adduced by Detective Sharp and the Sheriff to show that the deputies having executed the arrest warrants were themselves possessed of sufficient factual information to support a finding of probable cause for arrest without a warrant. The Court of Appeals held that since the arrest of Mr. Behrens would have been lawful had it been made by Detective Sharp on a warrantless basis, it was lawful. Was this error?

2. The Court of Appeals held, alternatively, that Detective Sharp was entitled to qualified immunity and that insufficient evidence was adduced by Mr. Behrens to show the deliberate indifference of the Sheriff to the constitutional rights of persons accused of child molestation. Was this error?

## LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

The names of all parties to the proceeding in the United States Court of Appeals Fifth Circuit appear in the caption of this case in this Honorable Court.

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## OPINIONS DELIVERED BELOW

The January 18, 1994 opinion of the United States Court of Appeals Fifth Circuit, whose judgment is sought to be reviewed, has been designated "Not for Publication" and is reprinted in the Appendix to this Petition. No opinion was delivered by the United States Court of Appeals Fifth Circuit in connection with its February 16, 1994 denial of petitioner's Petition for Rehearing. The July 31, 1992, September 17, 1992, June 8, 1993 and June 25, 1993 opinions of the United States District Court for the Eastern District of Louisiana are unpublished and are reprinted in the Appendix to this Petition.

## STATEMENT OF JURISDICTION

### A. DATE OF ENTRY OF DECISION OF UNITED STATES COURT OF APPEALS FIFTH CIRCUIT SOUGHT TO BE REVIEWED

The United States Court of Appeals Fifth Circuit affirmed the dismissal of petitioner's complaint by decision entered January 18, 1994.

### B. DATE OF DENIAL OF REHEARING BY UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

The United States Court of Appeals Fifth Circuit denied petitioner's Petition for Rehearing by decision entered February 16, 1994.

## C. BASIS FOR JURISDICTION

This Honorable Court has jurisdiction over this matter under 28 U.S.C. § 1254(1), by virtue of which the Supreme Court may review a decree rendered by a United States Court of Appeal.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

This case involves the Fourth Amendment and Section One of the Fourteenth Amendment to the Constitution of the United States which provide as follows with respect to searches and seizures:

AMENDMENT IV – SEARCHES AND SEIZURES

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV – CITIZENSHIP, PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . . "

## STATEMENT OF CASE

### A. NATURE OF THE CASE

This is an action for damages and to redress the deprivation under color of state law of basic fundamental rights secured to Mr. Behrens by the Fourth and Fourteenth Amendments to the Constitution of the United States. This action arises under 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the Constitution of the United States. Accordingly, the jurisdiction of the Trial Court was conferred by 28 U.S.C. § 1343.

### B. STATEMENT OF FACTS MATERIAL TO CONSIDERATION OF QUESTIONS PRESENTED FOR REVIEW

On March 27, 1990, Detective Sharp executed four (4) affidavits for Mr. Behrens' arrest, and four (4) warrants for Mr. Behrens' arrest were issued by Judge James R. Strain, Jr. on March 27, 1992 based upon Mr. Behrens having violated R.S. 14:43.1. Admission stipulated (Pre-Trial Order p. 1, 14, Supp. Record). These affidavits were "bare bones", "containing only conclusory statements that Gary Behrens had in fact committed the crime he was accused of. No evidence supporting the conclusions was contained in the affidavits." Order and Reasons p. 705,

707; Affidavits p. 309-312. These arrest warrants were executed by the Sheriff's Office on March 28-29, 1990. Admission stipulated (Pre-Trial Order p. 1, 14, Supp. Record). Detective Sharp did not execute these arrest warrants. Minute Entry p. 667; Detective Sharp's deposition transcript p. 331, 429. (Admission not stipulated in Pre-Trial Order. However, authenticity, but not admissibility, of machine copies of Sheriff's records [p. 696-700] stipulated [Pre-Trial Order p. 1, 26]. As a result of the execution of the first of the four(4) arrest warrants on the night of March 28, 1990, Mr. Behrens was required to spend the night of March 28, 1990 in the St. Tammany Parish Jail. Admission stipulated (Pre-Trial Order p. 1, 14-15, Supp. Record). The last three(3) of the four(4) arrest warrants were executed on the morning of March 29, 1990 while Mr. Behrens was confined in the St. Tammany Parish Jail. Admission stipulated (Pre-Trial Order p. 1, 15, Supp. Record). After posting a surety bond, Mr. Behrens was released from the St. Tammany Parish Jail on the afternoon of March 29, 1990. Admission stipulated (Pre-Trial Order p. 1, 15, Supp. Record). On June 7, 1990, a bill of information charging Mr. Behrens with four(4) counts of having unlawfully violated R.S. 14:81.2 by having committed molestation of Jennifer Behrens was filed in that certain action entitled "State of Louisiana vs. Gary Behrens", No. 189268, Twenty-Second Judicial District Court, State of Louisiana, Parish of St. Tammany. Admission stipulated (Pre-Trial Order p. 1, 15, Supp. Record). On May 3, 1991, the jury, at the trial of the criminal action, returned not guilty verdicts to each of the four(4) counts. Admission stipulated (Pre-Trial Order p. 1, 15, Supp. Record).

## C. COURSE OF PROCEEDINGS AND DISPOSITION OF MR. BEHRENS' CASE IN FEDERAL DISTRICT COURT

1. For the reasons assigned in the Reasons and Order of the District Court dated July 31, 1992, judgment was rendered on July 31, 1992 in favor of defendants and against Mr. Behrens, granting defendants' 12(b)(6) Motion and dismissing Mr. Behrens' suit at his cost. Reasons and Order p. 229; Judgment p. 228;

2. For the reasons assigned in the Minute Entry of the District Court dated September 16, 1992, Mr. Behrens' Motion to Alter or Amend Judgment was granted insofar as it sought to reinstate his Fourth Amendment claims but otherwise denied. Minute Entry p. 208;

3. For the reasons assigned in the Order and Reasons of the District Court dated June 7, 1993, judgment was rendered on June 8, 1993 in favor of defendants and against Mr. Behrens, dismissing Mr. Behrens' claims at his cost. Order and Reasons p. 705; Judgment p. 704. However, it is extremely noteworthy that for the reasons assigned in the Order and Reasons, the District Court did hold the arrest warrants to be invalid. Order and Reasons p. 705, 707-708;

4. For the reasons assigned in the Minute Entry of the District Court dated June 24, 1993, Mr. Behrens' Motion to Alter or Amend Judgment was denied. Minute Entry p. 667; and

5. For the reasons assigned in the decision of the Court of Appeals dated January 18, 1994, the dismissal of petitioner's complaint was affirmed.

6. The Court of Appeals denied petitioner's Petition for Rehearing by decision entered February 16, 1994. No opinion was delivered in connection with this denial.

This case now comes before this Honorable Court for review.

## REASONS FOR GRANTING WRIT

### I. MR. BEHRENS WAS ARRESTED UNLAWFULLY:

Mr. Behrens was arrested unlawfully: the warrants under which he was arrested were invalid (Order and Reasons p. 705, 707-708; Court of Appeals decision p. 8), and the arresting deputies had no probable cause to arrest him without a warrant. No evidence whatsoever has been adduced by Detective Sharp and the Sheriff to show that the St. Tammany Parish Deputies having executed these arrest warrants were themselves possessed of " . . . sufficient factual information to support a finding of probable cause for arrest without a warrant." *Whitely v. Warden, Wyoming State Penitentiary,* 401 U.S. 560, 566. In fact, Detective Sharp and the Sheriff have represented that plaintiff was arrested " . . . ***under the authority of*** the four arrest warrants executed by Judge Strain (emphasis supplied)." Pre-Trial Order; Motion for Summary Judgment p. 4, 8. It is noteworthy that *Whitely v. Warden, Wyoming State Penitentiary,* supra, has been extended to 1983 actions involving an officer's assumption of the

validity of a search warrant secured by fellow officers, a magistrate's determination of probable cause to issue an arrest warrant and an officer's determination of probable cause to effect a warrantless arrest. See *Morris v. County of Tehama*, 795 F.2d 791, 795 (9th Cir. 1986); *St. John v. Justmann*, 771 F.2d 445, 448 (10th Cir. 1985); *Kirk v. Hesselroth*, 707 F.Supp. 1149, 1152 (N.D.Cal. 1988).

Although the St. Tammany Parish Deputies having executed these arrest warrants may have been entitled to assume that the information presented to Judge Strain in the application for the issuance of same had been sufficient to support a finding of probable cause, "[w]here, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Whitely v. Warden, Wyoming State Penitentiary*, supra at 568. See also *United States v. Leon*, 468 U.S. 897, 922 [footnote No. 24] (1984).

The Court of Appeals overlooked the fact that the instant case is clearly distinguishable from the following cases which it cited at page 8 of its opinion rendered on January 18, 1994 in support of its holding that " . . . if Sharp had probable cause to arrest the appellant without a warrant, the appellant's Fourth Amendment rights were not violated":

A. *U.S. v. Calandrella*, 605 F.2d 236, 246-247 (6th Cir.), *cert. denied*, 449 U.S. 991 (1979);

B. *Weeks v. Estelle*, 509 F.2d 760, 765 (5th Cir.), *cert. denied*, 423 U.S. 872 (1975); and

C. *Hagans v. U.S.*, 315 F.2d 67, 68 (5th Cir.), *cert. denied*, 375 U.S. 826 (1963).

For the following reasons, the instant case is clearly distinguishable from *U.S. v. Calandrella:*

> Although the arrest warrants issued by the federal magistrate in *U.S. v. Calandrella*, 605 F.2d 236 at 242-246, were held by the Sixth Circuit Court of Appeals to be valid, the arrest warrants issued by Judge Strain in the instant case were held by the District Court to be invalid, a holding assumed by the Court of Appeals at page 8 of its decision to be correct. Although the Court of Appeals in *Calandrella*, 605 F.2d 236 at 246, agreed with the government's alternative argument that " . . . irrespective of the validity of the arrest warrant, the collective knowledge of the FBI agents at the time of the arrest was sufficient to establish probable cause[,]" that portion of the decision addressing this " . . . alternative justification for the arrest. . . . " appears to constitute dicta. In any event, although the arresting agents in *Calandrella* were found to have probable cause to arrest the defendants, no evidence whatsoever has been adduced by Detective Sharp or the Sheriff to show that the St. Tammany Parish deputies having executed the arrest warrants in the instant case were themselves possessed of " . . . sufficient factual information to support a finding of probable cause for arrest without a warrant." *Whitely v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 566. Accordingly, the "collective knowledge rule" contemplated in *Calandrella* appears to be inapplicable to the facts of the instant case.

For the following reasons, the instant case is clearly distinguishable from *Weeks v. Estelle:*

> Although the arrest warrants under which Mr. Behrens was arrested were held by the District Court to be invalid, a holding assumed by the Court of Appeals at page 8 of its decision to be correct, the defendant in *Weeks v. Estelle,* 509 F.2d 760 at 762, was not arrested under an arrest warrant but pursuant to a radio bulletin broadcast originally requested by an officer having probable cause to do so. It is noteworthy that the Fifth Circuit Court of Appeals in *Weeks,* 509 F.2d 760 at 763-764 [Footnote No. 8], specifically referenced the following observations of this Court in *Whitely,* 401 U.S. 560, 568:
>
> > "We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."

For the following reasons, the instant case is clearly distinguishable from *Hagans v. U.S.:*

> Although the Fifth Circuit Court of Appeals in *Hagans,* 315 F.2d 67 at 69, did not rule on the validity of the arrest warrant under which the defendant therein had been arrested, the arrest

> warrants issued by Judge Strain in the instant case were held by the District Court to be invalid, a holding assumed by the Court of Appeals at page 8 of its decision to be correct. Moreover, although the arresting agent in *Hagans*, 315 F.2d 67 at 69, was found to have probable cause to arrest the defendant, no evidence whatsoever has been adduced by Detective Sharp or the Sheriff to show that the St. Tammany Parish deputies having executed the arrest warrants in the instant case were themselves possessed of " . . . sufficient factual information to support a finding of probable cause for arrest without a warrant." *Whitely v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 566.

For the above and foregoing reasons, it was error for the Court of Appeals to hold that Mr. Behrens was arrested lawfully.

## II. DETECTIVE SHARP'S DEFECTIVE ARREST AFFIDAVITS CAUSED MR. BEHRENS TO BE ARRESTED UNLAWFULLY:

Detective Sharp's defective arrest affidavits caused Mr. Behrens to be arrested unlawfully. See *Malley v. Griggs*, 475 U.S. 335, 344. There was no break in the causal chain between Detective Sharp's defective arrest affidavits and Mr. Behrens' unlawful arrest. *Hale v. Fish*, 899 F.2d 390, 401 (5th Cir. 1990). "§ 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Malley v. Griggs*, supra at 344-345 [footnote No. 7] (Citing

*Monroe v. Pape*, 365 U.S. 167, 187 (1986). "Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." *Malley v. Griggs*, supra at 345 [footnote No. 7].

## III. DETECTIVE SHARP'S ARREST AFFIDAVITS WERE OBJECTIVELY UNREASONABLE:

The District Court held that Detective Sharp's arrest affidavits were insufficient to support a finding of probable cause by Judge Strain and, accordingly, held the arrest warrants issued by Judge Strain to be invalid. Order and Reasons p. 705, 707-708. This holding was assumed by the Court of Appeals at page 8 of its decision to be correct.

In view of the decision of the United States Supreme Court in *Whitely v. Warden, Wyoming State Penitentiary*, supra at 565 and 568, plaintiff's right to be free from arrest pursuant to an affidavit containing merely the affiant's conclusion that the individual named therein perpetrated the offense described in the affidavit instead of the facts upon which the affiant had relied in reaching such conclusion is a clearly established right. Accordingly, a reasonably well-trained officer in Detective Sharp's position would have known that her arrest affidavits failed to establish probable cause. See *Malley v. Griggs*, supra at 345. The Court of Appeals itself recognized at page 12 of its decision the objective unreasonableness of Detective Sharp's actions in presenting "bare bones" affidavits to Judge Strain. "What *Malley* does is establish a hybrid form of the *Harlow* objective reasonableness test that is applicable only to claims of qualified immunity advanced

by defendant police officers 'whose *request* for a warrant allegedly *caused* an unconstitutional arrest.' " *Rich v. Dollar*, 841 F.2d 1558, 1565-1566 (11th Cir. 1988) (Citing *Malley v. Griggs*, supra at 1098).

"It is well established that specific intent is not a prerequisite to liability under § 1983 . . . Nor is specific intent required in order to establish a violation of the Fourth Amendment . . . Rather, 'the question is whether the officer['s] actions are 'objectively reasonable' in light of the facts and circumstances confronting [her], without regard to [her] underlying intent or motivation.' . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable [arrest]; nor will an officer's good intentions make an objectively unreasonable [arrest] constitutional." *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). See also *Graham v. Conner*, 109 S.Ct. 1865, 1872-73 (1989); *Juriss v. McGowan* 957 F.2d 345, 348-49 (7th Cir. 1992).

For the above and foregoing reasons, it was error for the Court of Appeals to hold, alternatively, that Detective Sharp was entitled to qualified immunity.

## IV. THE SHERIFF WAS DELIBERATELY INDIFFERENT:

Although the Court of Appeals assumed that Detective Sharp's arrest affidavits were insufficient to support a finding of probable cause by Judge Strain, it found that "the appellant produced no evidence of state or national

standards demonstrating what constitutes adequate training for police officers likely to be involved in child sex abuse investigations."

In view of the decision of the United States Supreme Court in *Whitely v. Warden, Wyoming State Penitentiary*, supra at 565 and 568, Mr. Behrens' right to be free from arrest pursuant to an affidavit containing merely Detective Sharp's conclusion that he perpetrated the offense described in the affidavit instead of the facts upon which she had relied in reaching such conclusion is a clearly established right. Accordingly, as above set forth, a reasonably well-trained officer in Detective Sharp's position would have known that her arrest affidavits failed to establish probable cause. See *Malley v. Griggs*, supra at 345. Detective Sharp's "bare bones" affidavits provide the best indication of her absence of adequate training with respect to basic fundamental rights secured by the Fourth Amendment to the Constitution of the United States. However, the following facts also indicate an absence of adequate training of Detective Sharp:

A. Detective Sharp assumed her current position as a juvenile detective of the Sheriff on September 25, 1989. Detective Sharp's deposition transcript p. 331, 373-374, 376;

B. Prior to February 26, 1990, Detective Sharp's only formal law enforcement training was a 7-week general law enforcement school in August and September, 1989. Detective Sharp's deposition transcript p. 331, 374, 382-383;

C. Prior to February 26, 1990, Detective Sharp had participated in approximately 15 interviews, including interviews jointly participated in by other law enforcement officers. Detective Sharp's deposition transcript p. 331, 378-380.

This Court in *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), held that a local government has 1983 liability where the execution of official governmental policy causes the deprivation of constitutional rights. Policy may be attributed to a local government by virtue of the local government's formal declaration (direct order) or setting a course of action which, when followed by its agents, deprives someone of his constitutional rights. See *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984). A local government may set such a course of action by its own promulgation or by the acceptance of a course set or conducted by its agents. See *Bennett*, supra.

This Court in *Monell*, supra, held that official governmental policy may additionally be attributed to a local government by virtue of the delegation of its policymaking authority. Policymaking authority may be delegated expressly (express statement, job description or other formal action) or implicitly (acknowledgement of agent in a policymaking role through its conduct or practice).

Official governmental policy may be attributed to the Sheriff in the instant case by the Sheriff's setting a course of action to be followed by its agents (deliberate indifference of the Sheriff to the constitutional rights of persons accused of child molestation by virtue of his failure to assure adequate training of his employees/officers

with respect to basic fundamental rights secured by the Fourth Amendment to the Constitution of the United States and by virtue of his failure to adequately staff his office with persons sufficiently expert in such matters).

For the above and foregoing reasons, genuine issues of material fact exist with respect to the deliberate indifference vel non of the Sheriff to Mr. Behrens' constitutional rights by virtue of his failure to assure adequate training of his employees/officers with respect to basic fundamental rights secured by the Fourth Amendment to the Constitution of the United States and by virtue of his failure to adequately staff his office with persons sufficiently expert in such matters. Accordingly, it was error for the Court of Appeals to hold, alternatively, that the Sheriff was not deliberately indifferent to Mr. Behrens' constitutional rights.

## CONCLUSION

WHEREFORE, petitioner prays that for the above and foregoing reasons, a writ of certiorari issue to review the decision of the United States Court of Appeals Fifth Circuit entered January 18, 1994 and, after due consideration, said decision be reversed and this case be remanded to the District Court for further proceedings.

Respectfully submitted,

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## APPENDIX A

**The January 18, 1994 opinion of the United States Court of Appeals Fifth Circuit, whose judgment is sought to be reviewed, is reprinted in this Appendix.**

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-3517
Summary Calendar

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GARY K. BEHRENS,

Plaintiff-Appellant,

versus

KATHY SHARP, Individually, and as an employee/officer of Patrick J. Canulette, Sheriff, St. Tammany Parish, State of Louisiana and PATRICK J. CANULETTE, Sheriff, St. Tammany Parish, State of Louisiana,

Defendants-Appellees.

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Appeal from the United States District Court for the Eastern District of Louisiana
(CA 92-1498 "H" (5))

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(Filed Jan. 18, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

Gary K. Behrens, the appellant, commenced this § 1983 action against Kathy Sharp, a detective with the St. Tammany Parish Sheriff's Department, and Sheriff Patrick J. Canulette alleging that they violated his Fourth, Fifth, Sixth, and Fourteenth Amendment rights during a criminal investigation into allegations of child molestation against him by his five-year-old daughter. The allegations resulted in the appellant's prosecution on charges of sexual battery. A jury acquitted him of the charges. On the defendants' motion, the district court dismissed the complaint in this civil action for failure to state a claim. Behrens then moved, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment. The district court granted the motion and reinstated the appellant's Fourth Amendment claim and his pendent state law actions. In his Fourth Amendment claim, Behrens alleged that Sharp had maliciously initiated the criminal prosecution against him without probable cause, and that Sheriff Canulette was deliberately indifferent to his constitutional rights

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

because Canulette had failed to provide adequate training for his employees or to staff his office with persons sufficiently expert in child sex abuse cases.

Both defendants moved for summary judgment, arguing that probable cause existed for the appellant's arrest, or alternatively, that they were entitled to qualified immunity. They asserted that on February 26, 1990, Sharp received a phone call from Dr. George Lawrence's office, reporting that Cathy Behrens, the appellant's estranged wife, had brought her two daughters, Megan and Jennifer, in to be examined for possible sexual abuse. Lawrence found no physical evidence of abuse on Megan, but found an irritation in Jennifer's vagina. During an interview with Cathy Behrens later that day, Sharp asked Cathy why she suspected that her children had been sexually abused. Cathy responded that on Friday February 23, 1990, Jennifer, who was six years old, had been upset and crying at school and had stated that she was afraid of her father. Cathy also explained that Jennifer had not been sleeping well, that she had been clinging and hanging on her mother, and that recently Jennifer's grades had suffered. Cathy further said that on February 25, 1990, upon Jennifer's return from a visit with her father, she said she wanted to die because her father had touched her private parts. Cathy also informed Sharp that she had been separated from appellant, and that they had separated because he had been physically abusive.

Sharp briefly questioned Jennifer, who stated that her father had touched her private parts. Sharp then conducted a more extensive taped interview during which Jennifer said that her father had touched her vagina on four separate occasions. Jennifer initially indicated that

her father touched her only on the outside of her panties, but later said he touched her inside the panties once. Sharp and Donna Cohen, of the Office of Child Services, met with Gary Behrens, the father and the appellant, concerning the allegations on March 6, 1990. He denied the allegations. He suggested that they were a ploy by his wife to get custody of the children. He stated, however, that he did not believe Jennifer had made up the charges, but nevertheless claimed that he was not the perpetrator.

Sharp and Cohen interviewed both Jennifer and Jennifer's teacher at her school on March 21. In her deposition, Sharp explained that she wanted to re-interview Jennifer to ensure that her allegations were consistent. During this interview, Jennifer reiterated that her father had touched her vagina four times, but this time she said that he had touched her twice outside the panties and twice on the inside. Sharp was aware of the inconsistency, but testified that she was not concerned because the total number of touchings, four, was the same in both interviews. Jennifer's teacher told Sharp that since the holidays (about the time the visitations with the appellant commenced), Jennifer had been withdrawn from the other children, was no longer doing well in school, and had rubbed the back and inner thighs of a male classmate at school. On March 14, Dr. Helen Britton examined Jennifer at the New Orleans Children's Hospital's Child Sexual Abuse Clinic. Donna Cohen, of Child Services, later informed Sharp that she had learned from the hospital that Jennifer's physical examination revealed scarring in her vaginal area. Sharp testified that she understood the report as indicating possible sexual abuse.

Based on this information, Sharp prepared four identical affidavits for the appellant's arrest. The affidavits stated that appellant touched Jennifer's vaginal area four times between November 18, 1989, and February 25, 1990. Sharp presented the affidavits to Judge James R. Strain, of the City Court of Slidell, who signed four arrest warrants pursuant to which the appellant was arrested. Sharp testified that when she presented the affidavits to the judge, she provided him with additional background information about the case and her investigation.

In opposition to the motion for summary judgment, the appellant argued that the affidavits Sharp had prepared were insufficient to support a finding of probable cause, that a reasonably well-trained officer in Sharp's position would have known that the affidavits were insufficient, and that the additional information Sharp had provided to Judge Strain did not rehabilitate the affidavits because it was not given in the form of sworn testimony. Behrens further maintained that Sharp had omitted material information from the affidavit that would have vitiated a finding of probable cause. Specifically, the appellant asserted that Sharp had failed to inform the judge that: (1) there was an inconsistency between the date Donna Cohen had recorded as the day Jennifer first made her allegations, February 23, 1990, and the date Sharp had recorded, February 25, 1990; (2) he had denied the allegations and suggested that they were a ploy by his wife to gain an advantage in their custody battle; (3) he was not permitted to attend the initial interview, but his wife had attended and participated in the interview; (4) Sharp had spoken with Jennifer and Cathy about the allegations before the taped interview;

(5) Sharp had used improper techniques to question Jennifer, thereby contaminating the information she had obtained during the course of the interview; and (6) Sharp had failed to consider competing explanations for the allegations, such as Jennifer's anger toward him as the result of the divorce proceedings or coaching from his estranged wife. Behrens further argued that the Sheriff was liable under an inadequate training theory because Sharp had received no specialized training in interviewing child sex abuse victims before assuming her position as juvenile detective.

The district court granted defendants' motion for summary judgment. The court concluded that the "bare bones" affidavits Sharp prepared did not establish probable cause for the arrest warrants and that the additional information Sharp conveyed to Judge Strain did not cure the defect because she did not provide the information under oath or affirmation. The court determined, however, that Behrens's arrest was lawful because Sharp had probable cause for the arrest based on the information she had gathered during the course of her investigation. Alternatively, the court ruled Sharp was entitled to qualified immunity because her actions were objectively reasonable in the light of clearly established law. The court further determined that Canulette could not be found liable because the arrest was lawful. The court also observed that the appellant had failed to produce evidence to support his claim of inadequate training. Finally, the court dismissed the pendent state law claims over which it had no independent jurisdiction. The court subsequently denied the appellant's Rule 59(e) motion to alter or amend the judgment.

II

On appeal, Behrens maintains that the district court erroneously ruled that he was arrested lawfully because Sharp obtained the warrants based on "bare bones" affidavits, and the arresting officers did not have probable cause for his arrest. He further argues that Sharp did not have probable cause because (1) her interviewing techniques contaminated the initial interview with Jennifer; (2) she excluded the appellant from the initial interview; (3) she discussed the allegations with Cathy and Jennifer before the recorded interview; (4) she failed to explore possible competing explanations for Jennifer's allegations; and (5) she failed to take into account material inconsistencies in the statements made by Jennifer and Cathy. Behrens also contends that Sharp's actions were objectively unreasonable and that the Sheriff's inadequate training program for officers assigned to investigate child sex abuse cases evidenced deliberate indifference to his constitutional rights.

III

We review a grant of summary judgment *de novo*. *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 618-19 (5th Cir. 1993). Summary judgment is proper if the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1118-19 (5th Cir. 1992). The party opposing a motion for summary judgment must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 91

L. Ed. 2d 202 (1986). On appeal from summary judgment, this court examines the evidence in the light most favorable to the non-moving party. *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992).

IV

A

We will assume that the affidavits Sharp prepared and submitted to Judge Strain in support of her application for the arrest warrants failed to set forth sufficient facts to establish probable cause; thus, the warrants were invalid. *See Whiteley v. Warden*, 401 U.S. 560, 564-65, 91 S.Ct. 1031, 28 L. Ed. 2d 306 (1971). The legality of the appellant's arrest, however, turns on whether there was probable cause to support it. While the warrant requirement protects an arrestee's procedural rights, *Brown v. Edwards*, 721 F.2d 1442, 1453 (5th Cir. 1984), "[t]he Fourth Amendment does not require a warrant for an arrest made on probable cause." *U.S. v. Fortna*, 796 F.2d 724, 739 (5th Cir.), *cert. denied*, 479 U.S. 950 (1986). Accordingly, if Sharp had probable cause to arrest the appellant without a warrant, the appellant's Fourth Amendment rights were not violated. *See U.S. v. Calandrella*, 605 F.2d 236, 246-47 (6th Cir.) (even where arrest warrant defective, existence of probable cause will support officer's action), *cert. denied*, 449 U.S. 991 (1979); *Weeks v. Estelle*, 509 F.2d 760, 765 (5th Cir.) (where officer who issued radio bulletin for suspect's arrest had probable cause to arrest suspect, suspect's Fourth Amendment rights were not violated when other officers arrested him pursuant to bulletin), *cert. denied*, 423 U.S. 872 (1975); *Hagans v. U.S.*, 315 F.2d

67, 68 (5th Cir.) (defective warrant does not render arrest invalid if valid arrest could have been made without warrant), *cert. denied*, 375 U.S. 826 (1963).

"A police officer has probable cause to arrest if, at the time of the arrest, he had knowledge that would warrant a prudent person's belief that the person arrested had already committed or was committing a crime." *Duckett v. City of Cedar Park*, 950 F.2d 272, 278 (5th Cir. 1992). "[P]robable cause is to be determined on the basis of the facts available to the officers at the time, without reference to whether the evidence ultimately proved to be reliable." *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir.), *cert. denied*. 488 U.S. 822 (1988). The Court is not "authorized to second-guess the conduct of the police with the benefit of . . . knowledge, obtained from later developments, that the evidence eventually turned out to be unfounded or proved insufficient to show commission of a crime." *Id.* Police officers may not, however, "disregard facts tending to dissipate probable cause." *Id.*

B

Our review of the record in this case ultimately leaves us with no doubt that the facts available to Sharp at the time she applied for the arrest warrant supported a reasonable belief that Behrens had committed the crime of sexual battery, in violation of La. Rev. Stat. Ann. § 14:43.1.A (West Supp. 1993). Sexual battery includes the intentional touching "of the anus or genitals of the victim by the offender," where the victim "has not yet attained fifteen years of age and is at least three years younger than the offender." *Id.* By the time she applied for the

arrest warrant, Sharp had spoken with Jennifer twice, and during both interviews, Jennifer informed Sharp that her father had touched her vagina with his hand four times. The physical evidence available to Sharp buttressed the credibility of Jennifer's allegations. Dr. Lawrence found an irritation in Jennifer's vaginal area and Dr. Britton indicated that Jennifer's vagina showed signs of scarring, which Sharp knew to be evidence of sexual abuse. Sharp also received information from Jennifer's teacher and her mother concerning Jennifer's recent behavioral changes, including inappropriate sexual behavior at school, that supported the charges. Moreover, in her deposition, Sharp testified that she found Jennifer believable, that she did not appear to have been coached by anyone, that she seemed genuinely upset about the allegations, and that she did not otherwise speak negatively about her father. She further explained that she did not find the inconsistencies in Jennifer's allegations material and that she was unaware of the different date Cohen had recorded as the date Jennifer first made her allegations.

We have fully considered Behrens's arguments including his contention that the manner in which Sharp conducted the recorded interview with Jennifer contaminated it and rendered the information from that and the subsequent interview unreliable, thereby vitiating probable cause. To support this argument he relies on the trial testimony of Dr. Stephen D. Thurber, an expert in clinical child psychology, who was a defense witness at the appellant's criminal trial. Thurber described Sharp's initial interview with Jennifer as "replete with numerous contaminants which distorted the information." Thurber identified Sharp's use of leading and repetitive questions,

and discounting of responses as problems with the interview. Thurber also found fault with Sharp's decision to discuss the allegations with Jennifer before taping, Sharp's failure to have the appellant on the scene at the time of the interview, and Sharp's failure to explore alternative explanations for the allegations during the interview. Whatever merit these criticisms might have, they attack the *ultimate* reliability of the evidence obtained from the investigation and invite the Court to engage in precisely the type of second-guessing prohibited by *Bigford*.

C

Alternatively, even if we assume the facts Sharp possessed were insufficient actually to establish probable cause for the appellant's arrest, Sharp was nevertheless entitled to summary judgment. This is true because we conclude that a reasonable officer could have believed that probable cause existed for the arrest, and, thus, Sharp is entitled to qualified immunity. *See, e.g., Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 537, 116 L. Ed. 2d 589 (1991). Sharp's actions throughout the investigation, with the exception of the "bare bones" affidavits she prepared, were objectively reasonable in the light of the clearly established law. *See Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L. Ed. 2d 523 (1987). Sharp did not simply accept Jennifer's allegations and arrest appellant on the strength of those allegations. *Cf. Fittanto v. Klein*, 788 F. Supp. 1451, 1459 (N. D. Ill. 1992) (no qualified immunity for officer who arrested suspect on unsupported allegations of five-year-old without further investigation). Rather, before applying for the warrant, she

interviewed Cathy Behrens, the appellant, and Jennifer's school teacher, re-interviewed Jennifer, and obtained medical evidence consistent with abuse. As for Behrens's attack on Sharp's interviewing techniques, at least two courts have held that the law governing the proper methods of questioning alleged victims of child abuse is not so clearly established as to defeat a claim of qualified immunity. *See Myers v. Morris*, 810 F.2d 1437, 1458-61 (8th Cir.) (child sexual abuse allegations investigated in 1984-85), *cert. denied*, 484 U.S. 828 (1987); *Fittanto*, 788 F. Supp. at 1457-59 (law no clearer in 1992 than when *Myers* was decided). In both cases, the interviews of the alleged victims were attacked because they were conducted using techniques similar to the ones Sharp employed when she interviewed Jennifer. Therefore, because the law governing interviewing techniques in child sex abuse cases is not clearly established, the alleged deficiencies in the interview do not provide a basis for defeating Sharp's claim of qualified immunity.

IV

We now turn to Behrens's claims against Canulette. Behrens sued him in his official capacity, and, therefore, the real party in interest is the St. Tammany Parish Sheriff's Office. *See Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L. Ed. 2d 114 (1985). A governmental entity may be held liable under § 1983 when the execution of that entity's policy or custom causes a constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L. Ed. 2d 412 (1989). Because appellant has failed to establish a Fourth Amendment violation, no liability can be imposed against the Sheriff's Office.

Even if we concluded, however, that appellant's Fourth Amendment rights were violated, his inadequate training theory is unpersuasive. To prevail on this claim, appellant must establish that (1) the Sheriff's training procedures were inadequate; (2) Canulette was deliberately indifferent in adopting the training policy; and (3) the inadequate training policy directly caused his injury. *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir.), *cert. denied*, 113 S.Ct. 79 (1992). In *City of Canton*, the Supreme Court stated that deliberate indifference exists when

> in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

489 U.S. at 390.

The evidence here indicates that Sharp received no specialized training in interviewing child sexual abuse victims, even though she was hired to work in the juvenile division and was likely to encounter this type of case. Sharp did attend sexual abuse training classes, however. She also completed a seven-week general law enforcement course, and received two months of on-the-job training with another officer. She further testified that she had participated in a total of 15 interviews before she first interviewed Jennifer. Furthermore, as the district court observed, the appellant produced no evidence of state or national standards demonstrating what constitutes adequate training for police officers likely to be involved in

child sex abuse investigations. *See Benavides*, 955 F.2d at 973. Thurber's testimony addressed the type of training recommended for social workers or psychologists in interviewing victims. Nor did Behrens produce evidence of similar incidents, which would have made the need for more or better training so obvious as to render the failure to provide such training deliberate indifference. *See City of Canton*, 489 U.S. at 390; *Languirand v. Hayden*, 717 F.2d 220, 227-29 (5th Cir. 1983).

V

Finally, the district court correctly dismissed the appellant's state law claims because there was no independent basis for federal jurisdiction over them. *See Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989).

VI

For the reasons set out in this opinion, the judgment of the district court dismissing Behrens's complaint is AFFIRMED.

## APPENDIX B

The June 25, 1993, June 8, 1993, September 27, 1992 and July 31, 1992 opinions of the United States District Court for the Eastern District of Louisiana are reprinted in this Appendix.

MINUTE ENTRY
DUPLANTIER, J.
JUNE 24, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|---|---|
| GARY K. BEHRENS | CIVIL ACTION |
| VERSUS | NO. 92-1498 |
| KATHY SHARP, INDIVIDUALLY, and as an EMPLOYEE/OFFICER of PATRICK J. CANULETTE, SHERIFF, ST. TAMMANY PARISH, LOUISIANA; and PATRICK J. CANULETTE SHERIFF, ST. TAMMANY PARISH, LOUISIANA | SECTION "H"<br>(Filed Jun. 25, 1993) |

The motion to alter or amend judgment filed on behalf of plaintiff Gary Behrens, scheduled for hearing June 30, 1993, was considered this date on memoranda. For the following reasons the motion is DENIED.

Plaintiff's memorandum asserts that I "apparently assumed" that Detective Sharp arrested Gary Behrens. In ruling on defendants' motion for summary judgment I was well aware that Detective Sharp did not arrest Gary Behrens. While the *Reasons* do not so state, there is nothing therein to indicate otherwise.

If Detective Sharp had information upon which she could make a valid arrest, i.e., probable cause to believe that Gary Behrens had committed a felony, she cannot be held liable in damages for an arrest of Behrens by another officer.

As I stated in the *Reasons*, probable cause is not vitiated because the arrest warrant is invalid. This point is illustrated in *Whitely v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 91 S.Ct. 1031 (1971), a case cited by all parties. There, the arrest warrant was declared invalid because it was supported by a "bare bones" affidavit; the warrant involved here is invalid for the identical reason. Despite invalidating the arrest warrant, the Supreme Court went on to examine the validity of the arrest in terms of probable cause. The opinion assumed the obvious, i.e., that an arrest with an invalid warrant is nonetheless valid if it is supported by probable cause. That is the situation presented here.

Plaintiff in memorandum also contends that my alternative ground for granting summary judgment on plaintiff's claim against Sheriff Patrick Canulette (I held that plaintiff had failed to offer evidence of state and national standards concerning what constitutes inadequate training for investigations by police officers involving alleged sexual abuse of minors) was erroneous. Plaintiff contends that such evidence was presented, in the form of testimony by Steven D. Thurber, Ph.D. given at Mr. Behrens' criminal trial. Thurber testified as to the policy statement of the American Academy of Child and Adolescent Psychiatry regarding the desired qualifications of "interviewers" of alleged victims of child sexual abuse. It is obvious that those standards could not be applicable to

police officers: they recommend that interviews be conducted only by or in the presence of "child psychiatrists or trained psychologists." No police force could operated under those standards. Thus the evidence upon which plaintiff relies is insufficient to raise a genuine issue of material fact on the issue of whether Detective Sharp was inadequately trained.

/s/ Adrian G. Duplantier

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|---|---|
| GARY K. BEHRENS | CIVIL ACTION |
| VERSUS | NO. 92-1498 |
| KATHY SHARP, INDIVIDUALLY, and as an EMPLOYEE/OFFICER of PATRICK J. CANULETTE, SHERIFF, ST. TAMMANY PARISH, LOUISIANA; and PATRICK J. CANULETTE SHERIFF, ST. TAMMANY PARISH, LOUISIANA | SECTION "H" |

ORDER AND REASONS

The motion for summary judgment filed on behalf of defendants Kathy Sharp and Patrick J. Canulette was considered on memoranda. For the following reasons the motion is GRANTED.

FACTS

Dr. George Lawrence examined Jennifer Behrens, the six year old daughter of Gary Behrens and Cathy Behrens, and noted an irritated vulva and vaginal opening. He reported Cathy Behrens' allegations that Gary Behrens had sexually abused his daughter to the St. Tammany Parish Sheriff's Office. Detective Kathy Sharp investigated the allegations. Detective Sharp spoke to Jennifer and Cathy Behrens about the allegations and then formally interviewed Jennifer, who indicated that her father had touched her vagina four times.

Detective Sharp learned during the course of the investigation that Gary and Cathy Behrens were separated, that there had been a dispute over custody, that Gary Behrens had visitation rights with Jennifer, and that he had exercised those rights the day before Dr. Lawrence examined Jennifer. Gary Behrens was not present and was not advised of the allegations against him at the time Jennifer was initially interviewed. Thereafter Detective Sharp and Donna Cohen, an employee of the Office of Child Services, interviewed Gary Behrens; he denied the allegations and suggested that the allegations were an attempt by Cathy Behrens to deprive him of custody or visitation. From Jennifer's teacher, Detective Sharp learned that Jennifer's behavior and attitude had recently changed and that she had inappropriately touched a male classmate on the thigh. Detective Sharp spoke to Jennifer again, and she repeated that her father had touched her vagina. Donna Cohen told Detective Sharp that the physical examination conducted on Jennifer at Children's Hospital was inconclusive for abuse but did reveal vaginal scarring.

Apparently because the child alleged four "touchings", Detective Sharp applied to Judge James Strain for four warrants to arrest Gary Behrens. In support of the applications, Detective Sharp executed four identical affidavits which stated in pertinent part:

> During the months from November 18, 1989 and February 25, 1990, one Gary Behrens w/m did touch one Jennifer Behrens w/f 5 years of age about the vaginal area of her body on four (4) occassions (sic) at his residence. . . .

Judge Strain signed the requested four warrants, and Gary Behrens was arrested on four counts of molesting his minor daughter in violation of La.Rev. Stat. 14:43.1.

Following a trial by jury, Mr. Behrens was acquitted on all counts. Thereafter, Gary Behrens filed this suit against Detective Kathy Sharp and Patrick J. Canulette, Sheriff of St. Tammany Parish under 28 U.S.C. §1983. He alleges that his Fourth Amendment rights were violated: he was arrested pursuant to invalid warrants issued in reliance on Kathy Sharp's insufficient affidavits and there was not probable cause to arrest him.

## VALIDITY OF THE ARREST WARRANT

The Fourth Amendment's requirement that " . . . no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized . . . " applies to arrest warrants. *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245 (1958). Before a warrant for an arrest can issue, the judicial officer issuing the warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. *Whitley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 91 S.Ct. 1031 (1971). "[A] 'bare bones' affidavit is insufficient to establish probable cause." *See United States v. Brown*, 941 F.2d 1300, 1303 (5th Cir. 1991). Detective Sharp's affidavits were "bare bones"; they contained only conclusory statements that Gary Behrens had in fact committed the crime he was accused of. No evidence supporting the conclusions was contained in the affidavits. Detective Sharp's affidavits were insufficient to establish

probable cause for issuance of the arrest warrants. Moreover, although Detective Sharp did provide Judge Strain with information about her investigation prior to his signing the arrest warrants[1], there is no evidence that this information was relayed to Judge Strain under oath or affirmation as required by the Fourth Amendment.

## PROBABLE CAUSE

That the warrants were invalid is not dispositive of the issue of whether plaintiff's arrest was valid. A warrant is not a prerequisite to an arrest. A valid, constitutional arrest without a warrant can be made when a police officer has probable cause to believe that the person to be arrested has committed a felony. *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed. 2d 598 (1976). Thus, no constitutional violation occurred and plaintiff has no claim for damages, if there was probable cause for his arrest.

Probable cause for an arrest exists if at the time the arrest was made, the facts and circumstances within the

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[1] Detective Sharp advised Judge Strain that Mr. and Mrs. Behrens were separated. Depo. of Kathleen Sharp, p. 6. She also advised Judge Strain that she had interviewed Jennifer Behrens, who told her that her father had touched her at least four times and that the touching occurred on several occasions during Jennifer's visitation at her father's house. Depo. of Kathleen Sharp, p. 7-8. Detective Sharp also told Judge Strain that she had received verbal information that vaginal scarring was found during a physical examination of Jennifer at Children's Hospital and that such scarring was an indicator of possible sexual abuse. Depo. of Kathleen Sharp, p. 8-9.

officer's knowledge and of which the officer had reasonably trustworthy information were sufficient to warrant a prudent person's belief that a crime had been committed. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). The following facts and circumstances known to Detective Sharp supported her belief that plaintiff had committed the crimes for which he was arrested:

- Jennifer told Detective Sharp on two separate days that her father touched her vagina with his hand.
- Those statements were corroborated by medical findings of vaginal irritation and vaginal scarring.
- The vaginal irritation was noted by Dr. Lawrence the day after Jennifer visited her father.
- Detective Sharp also had the information from Jennifer's teacher about changes in Jennifer's behavior and attitude.

Plaintiff urges that the following factors preclude a finding of probable cause:

1) An inconsistency as to the date when Jennifer Behrens first made the allegations against her father;[2]
2) When Gary Behrens was interviewed by Detective Sharp he denied the allegations

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[2] Cathy Behrens told Detective Sharp that Jennifer first made the allegations against her father on February 26, 1990, after returning from visitation with her father. Donna Cohen told Gary Behrens that Jennifer's allegations were first made on February 23, 1990.

and told her that he had court ordered visitation with his children which he exercised on February 25, 1990;

3) Gary Behrens was not permitted to attend or participate in the initial interview of Jennifer while Cathy Behrens was permitted to attend and participate in the interview;

4) Detective Sharp spoke to Cathy and Jennifer Behrens about the pendency and nature of the allegations against Gary Behrens prior to the initial interview with Jennifer;

5) In interviewing Jennifer, Detective Sharp used leading questions and coercion through repetitive questions, and discounted Jennifer's responses;

6) Detective Sharp failed to consider competing explanations for the allegations against the plaintiff.

Notwithstanding these factors, I conclude that, considering the totality of the circumstances and the complete lack of any evidence that Detective Sharp's investigation was motivated or influenced by malice, there was probable cause to arrest Gary Behrens. Because the arrest was lawful, plaintiff has no claim under §1983. The fact that defendant Sharp procured invalid arrest warrants does not invalidate an arrest which would have been valid as a warrantless arrest.

## QUALIFIED IMMUNITY

Alternatively, assuming *arguendo* that probable cause to arrest Gary Behrens was lacking, Detective Sharp is nonetheless shielded from civil liability for damages

under the doctrine of qualified immunity. Qualified immunity protects a government official performing a discretionary function from civil damage liability for actions which could reasonably have been thought to be consistent with the rights the official is alleged to have violated. *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). "Whether a defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly established law." *Fraire v. Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992), citing *Anderson v. Creighton*, 483 U.S. at 639, 107 S.Ct. at 3038. Qualified immunity is conferred if reasonable public officials could differ on the lawfulness of the defendant's conduct. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

Kathy Sharp is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest Gary Behrens. *Hunter v. Bryant*, ___ U.S. ___, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). Plaintiff has the burden of proving that Detective Sharp acted in an "objectively unreasonable" manner. *Bennett v. Grand Prairie, Tex.*, 883 F.2d 400 (5th Cir. 1989). For the reasons already discussed, I find that plaintiff has failed to raise a genuine issue of material fact as to whether Detective Sharp acted in an "objectively unreasonable" manner. Indeed, even if a court were to decide that there was no probable cause for plaintiff's arrest, considering all the circumstances a reasonable police officer could have concluded that a warrantless arrest was justified.

## LIABILITY OF PATRICK J. CANULETTE

Because the arrest of plaintiff was lawful, defendant Patrick J. Canulette is not liable to plaintiff in damages. Alternatively, plaintiff's action against the sheriff must be dismissed on the additional ground discussed hereafter.

Patrick J. Canulette is sued in his official capacity as sheriff of St. Tammany Parish; therefore, the real party in interest is the St. Tammany Parish Sheriff's Office and not Patrick Canulette. *See Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). A governmental entity may be held liable under 28 U.S.C. §1983 only when the injury is inflicted through execution of that entity's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. *Monell v. Department of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978).

Plaintiff urges that the there was an official governmental policy of deliberate indifference to the rights of those accused of child molestation, manifested by the sheriff's failure to assure adequate training of his employees and officers with respect to basic Fourth Amendment rights and by virtue of his failure to adequately staff his office with persons sufficiently expert in such matters. In support of his contention, plaintiff relies on the fact that Detective Sharp's formal law enforcement training consists solely of a seven week general law enforcement school. Plaintiff also points out that Detective Sharp received no formal training on how to interview alleged child victims of sexual abuse and had only

participated in approximately 15 such interviews prior to beginning her investigation in this case.

To prevail on a claim that Sheriff Canulette violated his constitutional rights due to improper training, plaintiff must show that (1) the training procedures of the sheriff's office were inadequate; (2) Sheriff Canulette was deliberately indifferent in adopting the training policy; and (3) the inadequate training policy directly caused the plaintiff's injury. *Benavides v. County of Wilson*, 955 F.2d 968 (5th Cir. 1992), citing *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). "Deliberate indifference" in adopting a training program exists if:

> "in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in violations of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need."

*City of Canton v. Harris*, 109 S.Ct. at 1205.

Plaintiff has offered no evidence, such as state or national standards, to establish what constitutes inadequate training for investigations involving alleged sexual abuse of children. Additionally, plaintiff has not offered any evidence of prior similar incidents that might indicate the need for additional training. There is no evidence that the alleged inadequate training of detectives to investigate cases of alleged sexual abuse of a child was "so obvious . . . and likely to result in violations of constitutional rights" that Sheriff Canulette can be said to have been deliberately indifferent to such rights in adopting his training policy. Nor is there evidence that Sheriff

Canulette failed to staff his office with people sufficiently expert in investigating cases such as this.

## STATE LAW CLAIMS

Plaintiff's only remaining claims are state law claims over which there is no independent basis of federal jurisdiction. "Ordinarily, when the federal claims are dismissed before trial, the pendent state claims should be dismissed as well." *Wong v. Stripling*, 881 F.2d 200, 204 (5th Cir. 1989), citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). This case does not present any special facts or circumstances which favor retaining jurisdiction over the pendent state claims. Therefore, I decline to exercise pendent jurisdiction over the state law claims and order them dismissed without prejudice.

June 7, 1993

/s/ Adrian G. Duplantier
UNITED STATES
DISTRICT JUDGE

MINUTE ENTRY
DUPLANTIER, J.
SEPTEMBER 16, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|---|---|
| GARY K. BEHRENS | CIVIL ACTION |
| VERSUS | NO. 92-1498 |
| KATHY SHARP, INDIVIDUALLY, and as an EMPLOYEE/OFFICER of PATRICK J. CANULETTE, SHERIFF, ST. TAMMANY PARISH, LOUISIANA; and PATRICK J. CANULETTE SHERIFF, ST. TAMMANY PARISH, LOUISIANA | SECTION "H" (Filed Sept. 17, 1992) |

The motion to alter or amend judgment filed on behalf of plaintiff Gary K. Behrens was considered this date on memoranda. For the following reasons, the motion is GRANTED insofar as it seeks to amend the judgment so as to reinstate plaintiff's claims under the Fourth Amendment. Because the remainder of the motion does not raise any matters not previously considered, it is DENIED.

In considering a motion to dismiss, all well pleaded facts in the complaint must be accepted as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440 (5th Cir. 1986). Additionally, the allegations of the complaint are to be liberally construed. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440 (5th Cir. 1986). A motion to dismiss for failure to state a claim is proper only if it is clear that plaintiff can state no set of facts in support of his claim which would

entitle him to relief. *McLain v. Real Estate board of New Orleans*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980).

Plaintiff alleges that Detective Sharp's investigation of him, including her affidavits supporting the warrants issued for his arrest, were tainted by bias and that she maliciously initiated criminal proceedings against him, thereby violating his Fourth Amendment right to be arrested only upon a showing of probable cause. I erred in relying upon *Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982), to support dismissal of this claim. Under *Gonzales*, when the *facts* supporting an arrest are presented to an intermediary who makes an independent decision to issue an arrest warrant, the causal chain is broken, and no Fourth Amendment claim can be stated. *Gonzales* can have no application when the complaint is that the warrant issued as a result of allegedly unlawful conduct. Here, plaintiff alleges that defendant Sharp procured the warrant by presenting to the issuing judge a maliciously biased factual scenario.

Because it is possible that plaintiff can prove a set of facts which would entitle him to relief for violation of his Fourth Amendment rights, the motion to dismiss was improperly granted as to that claim.

Additionally, the reinstatement of the Fourth Amendment claim provides an independent basis of federal jurisdiction so as to warrant the exercise of pendent jurisdiction over the state law claims.

In summary, defendant's motion to dismiss is GRANTED insofar as it seeks to dismiss plaintiff's claims under the Sixth Amendment. The motion to dismiss is

DENIED to the extent that it seeks dismissal of plaintiff's claim under the Fourth Amendment and under state law.

/s/ Adrian G. Duplantier

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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|---|---|
| GARY K. BEHRENS | CIVIL ACTION |
| VERSUS | 92-1498 |
| KATHY SHARP, INDIVIDUALLY, and as an EMPLOYEE/OFFICER of PATRICK J. CANULETTE, SHERIFF, ST. TAMMANY PARISH, LOUISIANA; and PATRICK J. CANULETTE, SHERIFF, ST. TAMMANY DEFENDANTS | SECTION "H" |
| | (Filed Jul. 31, 1992) |

ORDER AND REASONS

The "Rule 12(B)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted" filed on behalf of all defendants was considered this date on memoranda. For the following reasons the motion is GRANTED, and plaintiff's suit will be dismissed at his cost.

Plaintiff brought suit under 42 U.S.C. §1983 against Kathy Sharp, a St. Tammany Parish sheriff's deputy, and Patrick J. Canulette, the Sheriff of St. Tammany Parish. Plaintiff alleges that he was deprived of his rights under the Fourth and Sixth Amendments of the Constitution and that he was denied due process during a criminal investigation.

FACTS

During an investigation of charges of sexual abuse upon Jennifer Behrens, the minor daughter of Gary

Behrens, Detective Kathy Sharp of the St. Tammany Parish Sheriff's Office interviewed Jennifer Behrens. Gary Behrens was not present at the interview and was not advised that charges were pending against him or that an investigation was being conducted.

After the interview with Jennifer, Kathy Sharp executed an affidavit for an application for arrest warrants. Judge James Strain issued four arrest warrants charging Gary Behrens with sexual abuse upon Jennifer Behrens. Following trial by jury, Gary Behrens was acquitted on all counts.

## LAW

The initial inquiry in a case involving a claim under 42 U.S.C. §1983 is whether the plaintiff has been deprived of a right secured by the "Constitution and laws" of the United States. *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed. 443 (1979). Plaintiff alleges a violation of his Sixth Amendment right to confront his accusers and a violation of due process because he was not present at the initial interview of his daughter. The Supreme Court has stated that, "it is this literal right to 'confront' the witness at the time of *trial* that forms the core of the values furthered by the Confrontation Clause." *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-35 (1970) (emphasis added). Plaintiff has not alleged that he was denied the right to confront his accuser at trial. Rather, he complains of the lack of confrontation during the investigatory process. The Sixth Amendment does not guarantee an individual the right to confront his accuser during a

criminal investigation. *Balliet v. Whitmire*, 626 F.Supp. 219 (M.D. Pa.), aff'd, 800 F.2d 1130 (3rd Cir. 1986).

The alleged denial of due process derives from the claimed Sixth Amendment violation. Thus, it must also be dismissed.

Plaintiff also contends that his Fourth Amendment right to be arrested only upon a showing of probable cause was violated because the investigation was tainted by Detective Sharp's bias. Plaintiff challenges only the detective's affidavit supporting the warrant, not the warrant itself. Assuming *arguendo* that the affiant was biased, no constitutional violation has occurred. The facts supporting the arrest were put before an intermediary, i.e., Judge Strain, who independently reviewed and issued the warrant, thereby breaking the causal chain. *Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982).

Plaintiff's only remaining claims are state law claims over which there is no independent basis of federal jurisdiction.

Justification for the doctrine of pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants . . . " *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). This suit is in the early stages of litigation, having been filed only three months ago, and the state claims are not closely related to questions of federal policy. Therefore, in view of the dismissal of the only federal claims, I

decline to exercise pendent jurisdiction over the state law claims.

/s/ Adrian G. Duplantier
UNITED STATES
DISTRICT JUDGE

July 31, 1992

## APPENDIX C

The February 16, 1994 decision of the United States Court of Appeals Fifth Circuit on Petition for Rehearing is reprinted in this Appendix.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-3517

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GARY K. BEHRENS,

Plaintiff-Appellant,

versus

KATHY SHARP, Individually, and as an employee/officer of Patrick J. Canulette, Sheriff, St. Tammany Parish, State of Louisiana and PATRICK J. CANULETTE, Sheriff, St. Tammany Parish, State of Louisiana,

Defendants-Appellees.

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Appeal from the United States District Court for the Eastern District of Louisiana

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## ON PETITION FOR REHEARING

(February 16, 1994)

Before JOLLY, WIENER, and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge